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IN THE COURT OF APPEALS OF INDIANA

STEVEN INCREMONA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	35A02-0010-CR-680
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HUNTINGTON SUPERIOR COURT
The Honorable Jeffrey Heffelfinger, Judge
Cause No. 35D01-0001-DF-011

April 25, 2001

MEMORANDUM DECISION-NOT FOR PUBLICATION

BAKER, JUDGE

Appellant-defendant Steven Incremona appeals his convictions for Criminal Mischief,[1] a class B misdemeanor, and Operating a Vehicle While Intoxicated With a Prior Conviction,[2] a class D felony. Specifically, Incremona asserts that a mistrial should have been granted because of prosecutorial misconduct, the jury was erroneously instructed and the evidence was insufficient to support the convictions.

FACTS[3]

The facts most favorable to the verdict are that on January 19, 2000, shortly after 4:00 p.m., Officer John Stech, a Markle Deputy Marshall, observed Incremona's red Jeep in the snow, stuck in an embankment at the corner of a field. He also noticed a "figure eight" pattern leading to where the jeep had stopped. Record at 231-32, 236. The Jeep was in gear, and Deputy Stech observed Incremona exit the vehicle. In an effort to dislodge the vehicle from the embankment, Incremona had attached a cable from the front of the Jeep to a mile-marker, which resulted in the post being pulled down.

When Deputy Stech approached Incremona and inquired as to what had occurred, he detected a strong odor of alcoholic beverage on Incremona's breath. After advising Incremona of our Implied Consent law,[4] Incremona told Deputy Stech that he would not take any chemical tests or field sobriety tests and started to walk away from him. Officer Steve Donnelly arrived at the scene, whereupon Incremona became argumentative and

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[1] IND. CODE § 35-43-1-2.

[2] IND. CODE § 9-30-5-3.

[3] Oral argument was heard in this cause on April 10, 2001 at St. Mary-of-the-Woods College in Terre Haute, in connection with Law Day sponsored by the paralegal program under the direction of Ms. Kathryn Myers. This program was awarded the American Bar Association's Law Day award in 1999.

[4] I.C. § 9-30-6-1.

called him a "f - - - ing Limey." R. at 245-46. Thereafter, Incremona was arrested and transported to the local jail. Incremona again refused to take any chemical tests or field sobriety tests that were offered to him.

Incremona was charged with the above offenses and a jury trial commenced on June 23, 2000. The State had alleged in the charging document that Incremona committed the offense of criminal mischief by knowingly or intentionally damaging the property of the State of Indiana "to wit: milemarker sign post and fence without the State's consent." R. at 6.

At one point during the trial, the prosecutor asked Incremona if he was aware of his duty to submit to a test for alcohol in accordance with Indiana's implied consent law. Incremona objected to the questioning on the basis that he had the right to refuse such a test. Incremona then acknowledged that he had submitted to a breath test on a prior occasion. Incremona did not request an admonishment or a mistrial, but the trial judge explained to the jury that while an individual may refuse to take a breath test, the refusal results in a one-year suspension of the person's operator's license. R. at 390.

Incremona also objected to a statement that the prosecutor had made during final argument with respect to this issue. Specifically, the prosecutor commented as to whether Incremona knew of the obligation to submit to a test for intoxication under the implied consent law. Following these comments, Incremona moved for a mistrial, which the trial court denied.

Incremona also objected to two of the final instructions that were presented to the jury regarding the implied consent law and a defendant's refusal to submit to a chemical test. Moreover, the trial court refused an instruction that Incremona requested which

provided that a jury "may or may not" consider the defendant's refusal to submit to the test as evidence. R. at 13. Additionally, the refused instruction requested the trial court to inform the jury that the reasons for a refusal to take a chemical test "may or may not have anything to do with the issues in this case." R. at 13.

The jury ultimately convicted Incremona of the charged offenses. At sentencing, Incremona was ordered to make restitution in the amount of $359 to Nancy Kline, the owner of the field. Kline had submitted a document to the trial court which set forth the estimated costs of repairing the damage that Incremona had done to the field.

DISCUSSION AND DECISION

I. Prosecutorial Misconduct

Incremona asserts that the prosecutor improperly questioned him at trial as to whether he had ever submitted to a chemical test for alcohol. Moreover, Incremona claims that the prosecutor's statements made during final argument, implying that Incremona knew he was obligated to submit to a chemical test, warranted the granting of a mistrial.

First, we note that in reviewing a claim of prosecutorial misconduct, this court considers first whether the prosecutor committed misconduct and second, whether the alleged misconduct placed the defendant in a position of grave peril. Robinson v. State, 693 N.E.2d 548, 551 (Ind. 1998). Whether the defendant is placed in a position of grave peril is determined by considering the probable persuasive effect of the misconduct on the jury's decision rather than the degree of the impropriety of the conduct. Id. A timely accurate admonition by the trial court is presumed to cure any error in the admission of evidence. Null v. State, 690 N.E.2d 758, 762 (Ind. Ct. App. 1998).

Turning to the circumstances presented in this case, we note that the following exchange occurred during Incremona's cross-examination by the prosecutor:

> Q: Were you aware at the time that this happened that you had a duty to submit to a test?
>
> A: At the time, no. Now I do. I understand very much so.
>
> Q: You didn't know you had to submit to a test on that day?

R. at 378. After Incremona objected to this questioning, the court, outside the presence of the jury, informed the prosecutor that he may ask about whether Incremona had ever consented to a test, but not about the conviction that stemmed from a previous test. R. at 384-85. Thereafter, Incremona was asked whether he knew of a duty to submit to a chemical test and whether he had ever done so. Incremona responded that he submitted to a test "last time," but chose not to take the test in this instance. R. at 386. The judge then, sua sponte, informed the jury that while a person has the right to refuse to submit to a chemical test, the result of such refusal is a one-year driver's license suspension. R. at 390. In light of this admonishment, the trial court cured any prejudice that may have inured to Incremona by addressing the substance of trial counsel's objection. Specifically, the judge clarified the rule of law and advised the jury of the consequences in the event that a person refused to submit to the chemical test.

Similarly, we note that a mistrial was not warranted as a result of the statements that the prosecutor made during closing argument. The prosecutor simply reiterated Incremona's trial testimony when he acknowledged that it was "not the first time [Incremona had] given a breath sample." R. at 430. Although Incremona objected to this comment on the grounds that the prosecutor was inappropriately making reference to a

prior conviction, we do not glean from the record that the State ever offered such evidence. Thus, Incremona has made no showing that the prosecutor's comments were improper, and his request for a mistrial was properly denied.

II. Jury Instructions

Incremona next contends that two of the final instructions read to the jury regarding implied consent were improper because those instructions "mandate[d] a conviction by an unfair comment on the weight of the evidence to be given by the jury when a person does not submit to a chemical test for intoxication." Appellant's brief at 22. In essence, Incremona is claiming that the instructions amounted to an unconstitutional shifting of the burden of proof.

We initially observe that a trial court's decision to instruct the jury is within its sound discretion, and this court reviews that decision for an abuse of discretion. Smith v. State, 730 N.E.2d 705, 706 (Ind. 2000). We also note that when determining whether a proffered instruction was correctly refused, we consider whether: 1) the refused instruction correctly stated the law; 2) the evidence supported giving the instruction; and 3) the refused instruction was adequately covered by other instructions. Id. at 706-07. Confusing or misleading instructions should not be given. Morgan v. State, 544 N.E.2d 143, 148 (Ind. 1989), trans. denied.

Here, the instructions that Incremona objected to provided that: "A person who operates a vehicle impliedly consents to submit to a chemical test as a condition of operating a vehicle in Indiana." R. at 51. The other instruction stated: "The Defendant's refusal to submit to a chemical test for intoxication is relevant evidence that may be considered by the jury." R. at 52. The instruction that was refused, which Incremona

offered, read: "A defendant's choice not to submit to a chemical test may or may not be considered by you as evidence. In this case, the reasons for the [Defendant] not taking a chemical test may or may not have anything to do with the issues in this case." R. at 13.

In addressing Incremona's contentions of error, we note that the first instruction quoted above precisely tracks the language of the implied consent statute. See I.C. § 9-30-6-1. Additionally, this court has held that an instruction permitting the jury to consider the defendant's "refusal to submit to a chemical test" as evidence of his guilt was proper and not confusing. Hurt v. State, 553 N.E.2d 1243, 1249 (Ind. Ct. App. 1990). I.C. § 9-30-6-3 specifically provides that "a person's refusal to submit to a chemical test is admissible into evidence."

We also note that the evidence at trial supported the instructions that were read to the jury. Specifically, Incremona testified that on a previous occasion he had agreed to take a chemical test. R. at 388. When asked why he refused to take the chemical test following his arrest by Deputy Stech, Incremona acknowledged that "this time I . . . was completely innocent." R. at 388. Incremona has also failed to make any showing that the instructions, as given, relieved the State of its burden to prove his guilt beyond a reasonable doubt. Specifically, the jury was informed that any single instruction should be considered "with all other instructions given." R. at 40. The jury was also instructed that the State was bound to prove each element of the offenses charged beyond a reasonable doubt and was informed of Incremona's presumption of innocence. R. at 47, 49, 53, 54. When considering the instructions in their totality, it is apparent that Incremona may not succeed upon this claim.

With respect to Incremona's refused instruction, we note that he presented no evidence demonstrating that there may have been reasons unrelated to the issues presented in "this case" that might have supported a reason for not taking a chemical test. Rather, Incremona's testimony that he was "completely innocent" suggests that the only reason he did not intend to take the test was in regard to his culpability in this incident. Even if Incremona had advanced other reasons for choosing not to submit to the test, the consequence of his refusal would have remained the same. We also observe that the instruction Incremona offered was covered by the other instructions that were read to the jury. Specifically, one of the instructions includes Incremona's proposed language stating that a defendant's refusal to take the chemical test may be considered as evidence. R. at 13, 52. Yet another instruction read to the jury stating that one impliedly consents to a chemical test for intoxication, covers the portion of Incremona's instructions regarding a defendant's decision as to whether to submit to testing. In light of such instructions, the trial court did not err in refusing Incremona's proffered instruction.

III. Sufficiency of the Evidence

Incremona also asserts that the evidence was insufficient to support his convictions. Specifically, he maintains that the State failed to present evidence of ownership, damage and lack of consent with respect to the criminal mischief charge, and further claims that the trial court's order of restitution directing him to pay for the damages that resulted to the field must be set aside. Additionally, Incremona claims that the conviction for driving while intoxicated must be set aside because the State did not present sufficient evidence of his intoxication.

A. Standard of Review

In reviewing sufficiency of the evidence claims, this court neither reweighs the evidence nor assesses the credibility of witnesses. Ellis v. State, 725 N.E.2d 411, 412 (Ind. 2000). We will affirm the conviction if the probative evidence and reasonable inferences drawn therefrom could have led a jury to find the defendant guilty beyond a reasonable doubt. Id. Further, this court considers only the evidence favorable to the jury's verdict. Id. We will affirm the conviction unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. Bethel v. State, 730 N.E.2d 1242, 1244 (Ind. 2000).

B. Criminal Mischief

To convict Incremona of this offense, the State was bound to prove beyond a reasonable doubt that Incremona recklessly, knowingly, or intentionally, damaged the State's mile-marker post without the State's consent. I.C. § 35-43-1-2(a)(1). At trial, the evidence showed that Incremona had attached a cable from his vehicle to a mile- marker post in an effort to release the jeep from the snow bank. R. at 360. When officer Stech arrived on the scene, he noticed that the cable was still hooked to the mile-marker post, but the post was on the ground. Officer Steve Donnelly, who assisted with the arrest, also testified that the sign was lying on the ground when he arrived. Both officers acknowledged that the mile-marker sign was associated with the nearby Interstate. In light of this testimony, it was reasonable for the jury to infer that the highway mile-marker belonged to the State and that Incremona knowingly and intentionally damaged that property by pulling down the post when attempting to free his vehicle from the snow

bank. Additionally, a reasonable inference could be drawn from these circumstances that Incremona damaged the sign without the State's consent.

Closely related to this issue, Incremona maintains that the order of restitution directing him to pay $359 to Nancy Kline, the owner of the field, must be vacated. In support of this contention, he notes that the State did not charge him with damaging the field. Moreover, Incremona points out that Kline was not named as a victim in the information that charged him with criminal mischief. Appellant's brief at 13. The record also reflects that the trial court did not enter an order of restitution with respect to the damage that Incremona had done to the mile-marker post.

In resolving this issue, we note that this court will set aside an order of restitution when an abuse of discretion occurs. Roach v. State, 695 N.E.2d 934, 943 (Ind. 1998). An abuse of discretion occurs when the trial court's determination is clearly against the logic and effect of the facts and circumstances before the court or the reasonable, probable, and actual deductions to be drawn therefrom. J.P.B. v. State, 705 N.E.2d 1075, 1077 (Ind. Ct. App. 1999). A victim of a crime includes an individual who can show a loss as a direct and immediate result of a defendant's criminal acts. Roach, 695 N.E.2d at 943. A restitution order must be based upon a consideration of "property damages of the victim incurred as a result of the crime, based on the actual cost of repair." IND. CODE § 35-50-5-3. Finally, we note that restitution should be ordered only for the loss caused by the specific conduct supporting the conviction. Polen v. State, 578 N.E.2d 755, 756 (Ind. Ct. App. 1991), trans. denied.

Here, it was established that Incremona crashed into the fence pole on the edge of the field after sliding off the road. Although it was demonstrated that "figure eight"

patterns appeared in Kline's field that were apparently caused by Incremona's vehicle, the only victim named in the charging information was the State of Indiana. There was no mention of Kline, and it was not alleged that Incremona had damaged her field with respect to the criminal mischief charge. As a result, the trial court's order directing Incremona to make restitution to Kline may not stand.[5]

C. Driving While Intoxicated

In addressing Incremona's claim regarding the State's failure to prove intoxication, we first note the provisions of I.C. § 9-13-2-86 which define "intoxication" as "under the influence of (1) alcohol . . . so that there is an impaired condition of thought and action and the loss of normal control of a person's faculties to an extent that endangers a person." See also Weaver v. State, 702 N.E.2d 750, 753 (Ind. Ct. App. 1998). The element of endangerment is shown by evidence that the defendant's condition or manner of operating the vehicle could have endangered any person, including the public, the police, or the defendant. Id. A defendant's intoxication does not require proof of blood alcohol content of .10% or more. Jellison v. State, 656 N.E.2d 532, 535 (Ind. Ct. App. 1995). Rather, proof that the defendant's condition rendered operation of the vehicle unsafe is sufficient to establish endangerment. Weaver, 702 N.E.2d at 753. Evidence of poor driving skills, failed field sobriety tests, difficulty with physical dexterity, or the smell of alcohol upon a driver is sufficient to sustain a conviction for driving while intoxicated. Mabbitt v. State, 703 N.E.2d 698, 701 (Ind. Ct. App. 1998).

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[5] We note, however, that our reversal of the restitution order does not preclude Kline from bringing a

Here, Officer Stech and Donnelly's testimony revealed that Incremona was driving in an impaired manner, as they discovered his Jeep resting on a snow bank against a fence post that Incremona struck. The trier of fact could infer that Incremona's attention and reflexes were impaired by alcohol, which caused him to slide off the road and continue driving in the middle of the field. Specifically, the evidence showed that Incremona had driven a figure eight pattern in the farm field. There was no road where Incremona was driving, and the officers noticed that he smelled strongly of alcohol.

Additionally, Incremona's actions and behavior immediately following the incident also tend to support the inference that he was intoxicated. As stated in the FACTS, Incremona displayed an aggressive attitude toward the police, inasmuch as he began to walk away from Officer Stech and referred to Officer Donnelly a "f - - - ing Limey" when he arrived at the scene. R. at 245-46. In considering such evidence and drawing reasonable inferences therefrom, we find that the trier of fact had substantial evidence of probative value before it to support Incremona's conviction for driving while intoxicated. Thus, the evidence was sufficient.

CONCLUSION

In light of our disposition of the issues set forth above, we conclude that the prosecutor did not commit misconduct so as to warrant the grant of a mistrial. We also note that the jury was properly instructed and the evidence was sufficient to support Incremona's convictions for driving while intoxicated and criminal mischief. We note,

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separate action against Incremona for the alleged property damage she sustained, if she chooses to do so.

however, that the order directing Incremona to pay restitution for the damage to the field must be vacated.

Affirmed in part, reversed in part and remanded to the trial court with instructions to vacate the order of restitution, and for further proceedings consistent with this opinion so that a proper order of restitution may be entered after determining the amount of damages that resulted to the State's property.

NAJAM, J., and BAILEY, J., concur.